

UNITED STATES DISTRICT COURT  
FOR THE  
DISTRICT OF VERMONT

Richard Davis,

Plaintiff,

v.

Civil Action No. 5:10-CV-154

Andrew Pallito, Jason Kennedy,  
Jeanne Jean, Kim Bushey, Trudee  
Ettlenger,

Defendants.

**REPORT AND RECOMMENDATION**

(Doc. 10)

Plaintiff Richard Davis, a Vermont inmate proceeding *pro se*, brings this action claiming that he was removed from rehabilitative programming without sufficient accommodations for his disability. Currently before the Court is Davis's motion for default judgment. (Doc. 10.) The motion asserts that after Davis filed his Complaint, Defendants had 120 days in which to file a responsive pleading, and that they have failed to do so. As set forth below, however, Defendants' deadline for filing a responsive pleading is determined by the date of service of the Complaint, not by the date of the Complaint's filing. Davis's motion should therefore be DENIED.

Davis submitted his proposed Complaint and a motion to proceed *in forma pauperis* on June 28, 2010. On June 30, 2010, the Court granted his motion (Doc. 2) and the Complaint was docketed that same day. Pursuant to the Court's Order, service was to be accomplished by the U.S. Marshals Service. (Doc. 2 at 4.)

A waiver of service was sent on November 23, 2010. Correspondingly, Defendants' responsive pleadings were due 60 days later, on January 24, 2011. *See* Fed. R. Civ. P. 4(d)(3) ("A defendant who, before being served with process, timely returns a waiver need not serve an answer to the complaint until 60 days after the request was sent . . . ."); Fed. R. Civ. P. 6(a)(2)(C) (if deadline lands on Saturday, Sunday or legal holiday, filing period extends to next business day). Davis filed his motion for default on January 18, 2011. (Doc. 10.) On January 24, 2011, Defendants timely filed a motion to dismiss under Fed. R. Civ. P. 12(b)(6). Defendants' Rule 12 motion suspends the deadline for filing a responsive pleading until after the Court issues a ruling on the motion. *See* Fed. R. Civ. P. 12(a)(4)(A); *Finnegan v. Univ. of Rochester Med. Ctr.*, 180 F.R.D. 247, 249 (W.D.N.Y. 1998). Accordingly, Defendants' responsive pleading is not yet due, and Davis's motion (Doc. 10) should be DENIED.

Dated at Burlington, in the District of Vermont, this 28th day of January, 2011.

/s/ John M. Conroy  
 John M. Conroy  
 United States Magistrate Judge

Any party may object to this Report and Recommendation within fourteen days after service thereof, by filing with the Clerk of the Court and serving on the Magistrate Judge and all parties, written objections which shall specifically identify those portions of the Report and Recommendation to which objection is made and the basis for such objections. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b)(2), 6(a), 6(d); L.R. 72(c). Failure to timely file such objections operates as a waiver of the right to appellate review of the District Court's adoption of such Report and Recommendation. *See* Fed. R. Civ. P. 72(a); *Small v. Sec'y of Health and Human Servs.*, 892 F.2d 15, 16 (2d Cir. 1989).